

Exhibit D

May 12, 2010 Transcript

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555 (JMP); 08-01420 (JMP) (SIPA)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.

Debtors.

- - - - -x

In the Matter of:

LEHMAN BROTHERS INC.

Debtor.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

May 12, 2010

10:07 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

1
2 HEARING re Conference re: Alternative Dispute Resolution
3 Procedures for Affirmative Claims of Debtors Under Derivatives
4 Contracts

5
6 HEARING re Debtors' Motion for Authority to Compromise
7 Controversy in Connection with a Repurchase Transaction with
8 Fenway Capital, LLC and a Commercial Paper Program with Fenway
9 Funding, LLC

10
11 HEARING re Motion of the SunCal Debtors for Order Determining
12 that Automatic Stay Does Not Apply; or, in the Alternative,
13 Relief from the Automatic Stay

14
15 HEARING re Motion of Debtors and Debtors in Possession for
16 Entry of an Order to Consolidate Certain Proceedings and
17 Establish Related Procedures

18
19 HEARING re Debtors' Motion to Compel Performance by Norton Gold
20 Fields Limited of its Obligations Under an Executory Contract
21 and to Enforce the Automatic Stay

1
2 HEARING re LBSF v. BNY Corporate Trustee Services Ltd. [Adv.
3 Case No. 09-01242] - Status Conference re Motion and Memorandum
4 of Law of Defendant BNY Corporate Trustee Services Limited in
5 Support of its Motion for Entry of an Order, or, Alternatively,
6 to Reopen and Reargue the Parties' Cross-Motions for Summary
7 Judgment

8
9 HEARING re Neuberger Berman v. PNC Bank, NA, et al. [Case No.
10 09-01258] - Status Conference re COMPLAINT FOR INTERPLEADER
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25 Transcribed by: Lisa Bar-Leib

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P R O C E E D I N G S

THE COURT: Be seated, please. Well, you're in the position to give a report.

MR. GRUENBERGER: Yes, Your Honor. Good morning.

THE COURT: Good morning.

MR. GRUENBERGER: Peter Gruenberger, Weil Gotshal & Manges for the debtors. May it please the Court. I'll be very brief. We are here today regarding Your Honor's ADR procedures order that governs debtors' affirmative claims under derivatives contracts with counterparties. And particularly, paragraph 10 of that order which requires that a monthly report be submitted to Your Honor giving a scorecard of how we're doing.

Your Honor issued that order on September 17, 2009. It took a few weeks to get going but we've been in full swing now for about six months. We and the creditors' committee concurred that with this six-monthly report that I submitted yesterday, we would put it on the docket so all interested parties could see the progress that we were making in this effort.

As the report to you demonstrates, the process is very much alive and healthy as we both predicted back in September when you signed the order. As of yesterday, forty-five ADR notices were served on seventy-one different counterparties. We had achieved as of yesterday ten settlements, four after-

1 mediations and six pre-mediations in the ADR process. Had I
2 waited two more hours, we could have added another success to
3 that scorecard because the fifth mediation came through with a
4 settlement. So now we're batting one thousand, five of five in
5 mediations and have eleven settlements involving fifteen
6 counterparties.

7 So we have added to date thirty-nine million new
8 dollars to the treasury of the debtors' estates for the benefit
9 of all creditors. And we are going strong. We have eight more
10 mediations scheduled over the next six weeks. And we will
11 report monthly. And I would hope that we could, every six
12 months perhaps, post the status report on the docket and make a
13 report to Your Honor, if that's okay.

14 THE COURT: I appreciate that. Let me just ask you
15 this question.

16 MR. GRUENBERGER: Certainly.

17 THE COURT: Obviously, the successful outcomes speak
18 for themselves. But in terms of procedure, is the ADR
19 procedure working well in terms of efficiency and are there any
20 areas needing improvement?

21 MR. GRUENBERGER: I would say, overall, it's very
22 efficient. There are some bumpy spots where parties,
23 especially parties in different parts of the world cannot
24 communicate as quickly as one would like in a perfect world,
25 but it's not a perfect world. And so we ride with those bumps.

1 and we overcome the hurdles. The mediators are working hard.
2 The creditors committee and we are getting along well. And I
3 see no gross inefficiencies whatever. I think that maybe over
4 the next six months I can report more fully but there's no
5 complaints out of any court from anyone.

6 THE COURT: Good. I appreciate that. Is there anyone
7 else who wishes to be heard on this subject? Fine.

8 MR. GRUENBERGER: Thank you.

9 THE COURT: Let's move on to the next part. And, Mr.
10 Gruenberger, if you wish to be excused, you may be; if you wish
11 to stay, you're welcome to stay.

12 MR. GRUENBERGER: Thank you, Your Honor.

13 MR. PEREZ: Good morning, Your Honor. Alfredo Perez
14 on behalf of the debtors. And I'm here on the debtors' motion
15 for authority to compromise with Fenway, docket number 7831.
16 May I proceed?

17 THE COURT: Sure.

18 MR. PEREZ: Your Honor, this is a 9019 motion in which
19 LCPI and LBHI seek -- on the one hand, seek to compromise and,
20 basically, do away with the Fenway structure. And it involves
21 a settlement with Fenway, Fenway Funding -- Fenway Capital and
22 Fenway Funding, Hudson Castle and the trustee or the
23 administrator which is Deutsche Bank.

24 Your Honor, we have received one objection to it from
25 the SunCal debtors. Both the unsecured creditors' committee

1 has filed statements in support as has Fenway.

2 Your Honor, last night, we received and was filed on
3 the record a withdrawal of the objection on behalf of the
4 SunCal involuntary debtors. I don't know if the Court's aware
5 of that.

6 THE COURT: I'm aware of it but I'm not sure if it was
7 a withdrawal on behalf of the SunCal voluntary debtors or the
8 trustee.

9 MR. PEREZ: The trustee, Your Honor. It's the -

10 THE COURT: It was from Lobel.

11 MR. PEREZ: From Mr. Lobel. It's on behalf of the
12 trustee.

13 THE COURT: I didn't understand it because it was a
14 withdrawal without prejudice. I don't know what that means.

15 MR. PEREZ: Well, Your Honor, I think what that means
16 is that the debtors and the trustee are in the process of
17 documenting a settlement that would resolve all the disputes
18 between the Lehman debtors and the trustee. And the key fact
19 about that, Your Honor, is that the property which the trustee
20 controls is about seventy-five percent of the value of the
21 SunCal debtors. So we're talking about we're on the verge of
22 finalizing and documenting a settlement with the party that has
23 the vast majority of the SunCal assets.

24 THE COURT: All right.

25 MR. PEREZ: So -- and not --

1 THE COURT: Let me just ask if the trustee is
2 represented in court today or on the telephone.

3 (Pause)

4 THE COURT: Apparently, yes.

5 MR. O'KEEFE: Actually, Your Honor, I represent the
6 voluntary SunCal debtors.

7 THE COURT: You represent --

8 MR. O'KEEFE: The voluntary SunCal debtors not the
9 involuntary debtors, although I could speak to the issue from a
10 knowledge perspective but not on behalf of the trustee.

11 THE COURT: All right. So there's no one here acting
12 as local counsel for Mr. Lobel and Mr. Lobel is not on the
13 phone?

14 MR. O'KEEFE: Not to my knowledge, Your Honor.

15 THE COURT: Okay. Why don't you proceed?

16 MR. PEREZ: Thank you, Your Honor. So, Your Honor, I
17 think this is a key development not only as it relates to this
18 motion but, absolutely, as it relates to the motion of lift
19 stay because they've also withdrawn their request on the motion
20 to lift stay.

21 So, Your Honor, what we have is a situation where --
22 and Fenway has obviously been the subject of a lot of scrutiny
23 recently. But it's a structure whereby LCPI repo'd certain
24 assets to Fenway. Fenway then, in turn, issued a commercial
25 paper note that was purchased by LBHI. I have a chart. It's

1 similar to the chart that was attached to one of the pleadings,
2 Your Honor. If I may approach?

3 THE COURT: Sure. Thank you.

4 MR. PEREZ: But, in essence, Your Honor, it's a very
5 simple chart. LCPI repo'd the assets to Fenway Capital.
6 Fenway Capital issued a variable funding note to Fenway
7 Funding. Fenway Funding then issued commercial paper. That
8 commercial paper was purchased by LBHI. Approximately three
9 billion dollars. Those -- that commercial paper was pledged to
10 JPMorgan. And, Your Honor, the reason we can undo the
11 structure currently is because as a result of the JPM
12 agreement, the CDA, we now have -- LBHI now has that commercial
13 paper.

14 So the goal, Your Honor, is to reduce the cost
15 associated with the Fenway structure, be able to deal with the
16 assets directly. SunCal is about half of the three billion in
17 Fenway assets. In connection with that, there are other
18 assets, some of them not even real estate related, that sit in
19 the Fenway structure that LCPI and LBHI need to deal with.

20 THE COURT: What's the Hudson Castle involvement with
21 this?

22 MR. PEREZ: Your Honor, Hudson Castle -- and Ms.
23 Goldstein is here and could address this. But Hudson Castle is
24 basically the manager of the Fenway structure, Your Honor.

25 So, to some extent, what we've done here is just a

1 plain vanilla motion which seeks to not only undo the structure
2 but, very critically, maintain the status quo among the
3 debtors. That's a critical importance. As the Court is aware,
4 we filed twenty-three separate plans. I mean, one document but
5 twenty-three separate plans. The recovery percentages for the
6 LBHI creditors are different than the recovery percentages for
7 the LCPI creditors. So we do not want to, in any way, shape or
8 form, affect what the recovery balances would be. And in
9 connection with that, in the motion as filed, we indicated that
10 LBHI would be tendering the commercial paper notes as the
11 guarantor, 'cause LBHI was on both sides, not only did it buy
12 the commercial paper but it also guaranteed LCPI's obligations
13 under the Master Repurchase Agreement. So they tendered as the
14 guarantor. They tendered the notes as the guarantor. And
15 there was a full reservation of rights as between the debtors
16 to make sure that we could allocate the value as was indicated.
17 Subsequent to that, there were -- this was filed on March --
18 mid-March. The JPMorgan agreement was approved, I think,
19 either shortly thereafter or right around the time we filed it
20 at the March hearing. Since that time, a bunch of time has
21 passed. We have further refined the reservation of rights to
22 make sure that we maintain the rights as between the parties.
23 So we filed the supplemental order, the revised order, which
24 made sure that everybody maintained their rights. And then we
25 also filed a supplement to the motion. And basically, what the

1 supplement did was, at the time that we originally structured
2 the transaction, Fenway and Hudson Castle were getting limited
3 releases. Deutsche Bank was getting a full release. Through
4 the supplement to the motion, those releases were further
5 scaled back -- the releases that Fenway and Hudson Castle were
6 getting were further scaled back. So that's the purpose of
7 those two motions.

8 Now, Your Honor, as I read -- and there's been a lot
9 of paper filed. But as I read the papers, there's really no
10 objection to the debtors' business judgment in doing this
11 transaction. I mean, we're going to be saving costs, we're
12 getting rid of structure. We're going to be able to deal with
13 the assets directly. I think the objections go to other
14 things, not really related to the business judgment.

15 I have Mr. Fitts here who could talk to the business
16 judgment. I don't think that's really necessary to put him on
17 because we just really -- there's no allegation that there is
18 any -- that we're not exercising our business judgment.

19 The focus is whether this is being done somehow in bad
20 faith. And, Your Honor, I submit there's absolutely no
21 evidence that this is being done in bad faith. I --

22 THE COURT: Well, consistent with the fact that we
23 have a contested hearing still on this, you might want to
24 proffer the testimony that you have available, both as it
25 relates to the purpose of the transaction and the good faith of

1 the transaction and why it's being done now.

2 MR. PEREZ: Yes, Your Honor. I could certainly do
3 that. Your Honor, Mr. Fitts is in the courtroom. I believe
4 he's testified before. As the Court is aware, Mr. Fitts is a
5 managing director with Alvarez & Marsal. He is the co-head of
6 the real estate group at Lehman and he's familiar with this
7 transaction. He was managing director at GE and was formerly
8 in Citibank's workout group where he had extensive experience
9 since approximately 1988.

10 He's been assigned to the representation of Lehman
11 since September of 2008. In connection with the Fenway repo
12 and the Fenway commercial paper program, he has reviewed the
13 motion and informed himself of the relevant transaction as
14 embodied in the various documents.

15 He would testify that the assets were repo'd to Fenway
16 and that the goal of this motion is to be able to save the
17 money that's associated with maintaining the structure; that in
18 September of 2008, Fenway Funding issued commercial paper notes
19 to LBHI and that LBHI is the current holder of those notes;
20 that the proposed actions are intended to eliminate the expense
21 and time delay associating with maintaining the programs;
22 eliminating the administrative fees to Deutsche Bank, Hudson
23 Castle and other third parties in connection with maintaining
24 the repo and the commercial program; and enabling LBHI to
25 access certain funds that are currently held at the Fenway

1 structure in approximately a little over a million dollars.

2 He would testify that the transaction is done on the
3 basis of arm's length negotiation with Fenway and that the goal
4 would be to put LCPI in the position that it was prior to the
5 time of the funding of the repo maintaining LBHI's interest in
6 the notes.

7 Additionally, Your Honor, Mr. Fitts would testify that
8 as a result of the transaction with JPMorgan Chase that we're
9 able to undo the structure and that there are several other
10 structures that hold real estate assets that now, as a result
11 of the JPMorgan transaction are in the process of being
12 unwound.

13 Mr. Fitts would further testify that this is a
14 reasonable exercise of the debtors' business judgment to
15 alleviate the expense and time delay associated with
16 maintaining both the repo and the commercial paper program;
17 that it was done -- that the transaction is fair and reasonable
18 to the debtors under the circumstances; and that it was the
19 product of protracted arm's length negotiation.

20 LBHI would indemnify Fenway and Hudson Castle with
21 respect to certain activities related to the assets as modified
22 by the supplement to the carve-out of the indemnity and the
23 guaranty. In addition, they would pay approximately a million
24 six in attorneys' fees to Fenway in connection with the amounts
25 of money that they have expended.

1 Mr. Fitts would further testify that the concessions
2 that have been made by LBHI and LCPI are far outweighed by the
3 benefits that LBHI and LCPI would receive as a result of
4 undoing the structure.

5 Your Honor, I don't think -- that would be the
6 conclusion of his testimony.

7 THE COURT: Is there any objection to my receiving the
8 proffer in evidence in support of the motion?

9 MR. O'KEEFE: Good morning, Your Honor. Sean O'Keefe
10 appearing on behalf of the voluntary SunCal debtors. My only
11 objection is to the extent that the testimony, counsel's
12 characterization of testimony is inconsistent with what is
13 reflected in the motion then I would seek the right to cross-
14 examine Mr. Fitts because the characterization by counsel of
15 certain elements of that transaction is directly contrary to
16 what is reflected in the motion. And if that's the testimony
17 then I would respectfully ask the Court to have Mr. Fitts take
18 the stand on those limited issues.

19 THE COURT: If you wish to cross-examine, that's your
20 right.

21 MR. O'KEEFE: Then I would ask the Court to call him
22 to the stand.

23 MR. PEREZ: Your Honor, I'm not sure that anything in
24 his testimony contradicted what's in the motion or what's in
25 the transaction. And, frankly, Your Honor, this is a common

1 theme in their objection which I, frankly, don't understand.
2 It's our motion with Fenway. We can basically file a motion
3 requesting for the Court to do various things. I'm not sure I
4 understand what the objection is. I think we've clearly
5 reflected what we want the motion to do, that we want it to
6 preserve the integrity as between LCPI and LBHI. So I'm not
7 sure what the nature of the objection is.

8 MR. O'KEEFE: Your Honor --

9 THE COURT: Well, at the moment, we're dealing with a
10 very limited question which is whether the proffer of Mr.
11 Fitts' testimony is to be accepted as is or whether or not you
12 want the right to cross-examine. You have the right to cross-
13 examine as an objector regardless of your rationale. And if
14 you want to have Mr. Fitts on the stand, ask him some
15 questions, he's here. So we can have him come to the stand.
16 We don't have to have an argument about whether or not you have
17 some basic right to object. You do. It doesn't matter what
18 your objection is. You're a party in interest; you're
19 objecting. I think I know what your objection's about. It's
20 about having these loans come into the estate and be subject to
21 the automatic stay and the SunCal litigation in California.
22 Isn't that right?

23 MR. O'KEEFE: Your Honor, certainly that is our
24 primary concern. And just to respond to counsel's comment, I,
25 in no way, want to interfere with this transaction except in

1 the following limited respect. I understand --

2 THE COURT: Well, that means you do want to interfere
3 the transaction.

4 MR. O'KEEFE: Well, Your Honor, not as stated in the
5 motion. Not as stated in the motion. The motion states, "The
6 parties will terminate the MRA". So the MRA is terminated. So
7 this contention that a terminated contract can somehow give
8 rise to liens which are provided for therein, that would be my
9 issue. So if they're saying it's not terminated, that's not
10 what' s in their motion. They say the guaranty will be
11 terminated. So we would simply ask them to acknowledge the
12 guaranty is terminated. And that's the basis for their claims
13 against LCPI. They also state the CP notes are terminated.
14 That's right here in front of me on page 10. "The CP notes are
15 terminated." This exchange, they state, is in full payment of
16 the purchase price under the MRA. So that transaction is done;
17 it's over. I think we can all agree you can't have a lien if
18 there's no claim. You can't have a lien if there's no
19 underlying lien documents.

20 THE COURT: Well, we're not arguing your objection
21 right now. We're dealing with, as I said, a very narrow
22 question. Do you want to examine Mr. Fitts? If so, we'll call
23 him to the stand now. If you want to accept the proffer, we
24 can accept the proffer with your rights reserved in terms of
25 what you're arguing about and we can reserve that to argument.

1 But that's what's currently in front of me.

2 MR. O'KEEFE: Well --

3 THE COURT: It's binary. We either have Mr. Fitts or
4 we don't have Mr. Fitts as a witness.

5 MR. O'KEEFE: Your Honor, then we would -- we would
6 reserve our rights. The only issue is I have a material
7 concern about Your Honor making findings based upon that
8 characterization of the testimony as opposed to what is before
9 us in terms of their motion.

10 THE COURT: Well, you can certainly argue whatever you
11 want to argue about the reasonable conclusions to be drawn from
12 the record. And you're also free, if you wish, to call Mr.
13 Fitts to the stand and ask him as many direct questions as you
14 wish.

15 MR. O'KEEFE: Your Honor --

16 THE COURT: If you want to simply reserve this to
17 argument, that's fine, too. It's up to you.

18 MR. O'KEEFE: We will reserve it, Your Honor. We
19 understand the standard. I agree they have a lot of
20 discretion. And we're certainly not here to interfere with
21 this transaction. We're not a claimant in this case. So we
22 haven't asserted standing to get into the issue of the merits.

23 THE COURT: Oh. Then why don't you just sit down?

24 MR. O'KEEFE: I will, Your Honor.

25 THE COURT: If you acknowledge you don't have

1 standing --

2 MR. O'KEEFE: Only in terms of the issue of their
3 discretion and that transaction. But to the extent that
4 those -- the assertion of those findings relative to the
5 characterization of the transaction could affect my client then
6 I did have concerns. And Your Honor is saying that you're
7 inclined to approve the transaction, as I understand it,
8 without making those findings.

9 THE COURT: No. I didn't say that. What I said was
10 that if you have a concern about the proffer and wish to
11 examine the witness in order to make a record that you view to
12 be either more consistent with your understanding of the facts
13 or more helpful to you in the argument you wish to make when we
14 get into the legal argument phase of this, you're free to call
15 the witness. That's the only thing we're talking about now.

16 MR. O'KEEFE: Very well, Your Honor. We will reserve
17 the right for the following motion.

18 THE COURT: All right. So I take that as you're not
19 calling Mr. Fitts. I don't have any questions of Mr. Fitts. I
20 accept the proffer with such conclusions to be drawn from the
21 proffer as will be determined following argument.

22 MR. O'KEEFE: Thank you, Your Honor.

23 THE COURT: Okay.

24 MR. PEREZ: Your Honor, I'm glad Mr. O'Keefe brought
25 up the question of standing. And the only reason I raise it is

1 because I did -- I'm kind of a newcomer to this whole
2 situation. So I did look up to see if there had been any
3 proofs of claim filed. I couldn't find any proofs of claim
4 that had been filed by any of the SunCal debtors one way or
5 another. So obviously, they filed a motion to lift stay. But
6 I haven't been able to determine, in fact, what their standing
7 is. And they certainly haven't filed a proof of claim in this
8 proceeding.

9 (Pause)

10 MR. PEREZ: Just to continue, Your Honor, as it
11 relates to the indication of bad faith, the committee has
12 reviewed this transaction, has reviewed this transaction
13 extensively. They have filed two documents in support of the
14 transaction. There's no indication that there's bad faith.
15 The testimony is that this has been subject of a long
16 negotiation, arm's length negotiation with Fenway.

17 So, Your Honor, the main issue that has been raised by
18 SunCal and what I think they simply ignore at every turn and
19 for some reason it's a little bit of "gotcha" lawyering is that
20 LCPI has always had the right to repurchase the loans. LBHI
21 has always been the guarantor of the loans. LBHI has always
22 held the commercial paper which is the economic -- which is
23 part of the economic interest in the loan. Now that it's not
24 subject to the JPMorgan pledge, they can deal with it. There
25 has -- Fenway has consistently taken the position -- and I

1 think there are five instances that were cited in the papers
2 where they've said we're just the middleman in this. We really
3 don't have an economic interest because you have LCPI and LBHI
4 on one side and LBHI on the other side.

5 So, Your Honor, when you boil this down to its
6 essence, two things are happening. We're doing away with a
7 costly structure, that is Fenway. We're doing away with that
8 and it's not the only one that we're going to be doing away
9 with because there were several of these. Second, we are doing
10 everything possible, as is our fiduciary obligation in
11 connection with the representation of twenty-three separate
12 estates to maintain the economics of each -- the integrity of
13 the economics of each debtor. And in this case, LBHI paid for
14 the commercial paper. They're the holder of the commercial
15 paper. And they clearly will have an interest in those assets
16 because those assets form part of the recovery in their estate.

17 So, Your Honor, I would request that the Court approve
18 the motion. There's really been no -- no challenge to the
19 debtors' business judgment. And I don't think there can be any
20 real challenge to any bad faith associated with undoing this
21 transaction. This has been going on for a long time. We have
22 e-mails from Ms. Goldstein going back to January saying they've
23 been wanting to get out -- and earlier, saying they've been
24 wanting to get out of this. I mean, much longer, saying that
25 they've been wanting to get out of the transaction. This is a

1 cost saving measure and it effectively allows the debtors to
2 deal with the assets. And half of the loans in Fenway have
3 nothing to do with SunCal, Your Honor.

4 THE COURT: Mr. Perez, you said a little earlier in
5 your presentation that you're new to this.

6 MR. PEREZ: Correct.

7 THE COURT: Now, you're not new to the bankruptcy case
8 itself, obviously. You've been involved from the very
9 beginning.

10 MR. PEREZ: I have, Your Honor.

11 THE COURT: When you say you're new to this, do you
12 mean you're new to the ongoing hostilities between the SunCal
13 debtors and the Lehman estates?

14 MR. PEREZ: Correct, Your Honor.

15 THE COURT: All right. To the extent that there is an
16 allegation of bad faith in this transaction, it seems to me
17 that it relates to the following. There is the suggestion by
18 the SunCal debtors that one of the motivations for this
19 transactions is to bring assets into the debtors' estates that
20 are not now within the estate directly by virtue of the Fenway
21 structure, and as a result, to have those assets subject to the
22 automatic stay which would, in their view -- and I'm
23 characterizing their view -- materially interfere with the
24 prosecution of equitable subordination litigation pending in
25 the bankruptcy court in Santa Ana, California. That's my

1 understanding of their view as to why this transaction may be
2 suspect. What's your response to that?

3 MR. PEREZ: Your Honor, I have several responses to
4 that. First of all, that is based on what I believe to be a
5 false premise. LCPI has always had rights to those assets
6 through the repurchase agreement. They've always had that
7 right. If the Court looks at the Palmdale decision while the
8 BAP panel never reached that issue because, remember, Your
9 Honor, there are loans that LCPI has that are not in Fenway,
10 that are SunCal loans. So we'll get to the issue of the
11 automatic stay at the next hearing. But there are loans in
12 SunCal -- SunCal loans that are not in Fenway. So while the
13 BAP never reached that decision, it did say that LCPI might
14 likely have an interest through the repurchase agreement.
15 That's number one.

16 Number two, I think that the examiner's report is
17 fully replete with references to the fact that these repo
18 agreements were financings, that they were not sales. I mean,
19 that Lehman used the repo transaction in order to provide
20 financings.

21 Third, Your Honor, LBHI has always had an interest.
22 They're the ones that paid three billion dollars. They've
23 always had an interest in these assets. They've never not had
24 that interest.

25 THE COURT: I understand all that and I accept that

1 argument. But they're saying that this is, in part, an effort
2 to expand the scope of the automatic stay and the SunCal
3 litigation to these assets. And they say that various
4 statements were made on the record that ignore the Fenway
5 structure. It was, if I'm understanding it correctly,
6 representations made that there was property of the estate in
7 the SunCal bankruptcy cases when, in fact, some of loans were
8 within the Fenway structure. And to the extent that that's
9 true, and I'm not saying that it is true because I don't know
10 those facts, but undoing the structure is a way to cure that
11 defect.

12 MR. PEREZ: Well, Your Honor, I'm not sure that I
13 agree with that premise. I believe that -- and I haven't gone
14 back and read every single transcript. I've certainly read
15 most of the stuff that's been filed. But, Your Honor, to the
16 extent that Lehman held these assets as loans on their books,
17 even though they were repo'd to Fenway then I think that they
18 would have every right to do that. And every indication based
19 on the examiner's report, that's, in fact, what they did. So
20 I'm not sure that there is any real deception that went on
21 there.

22 Furthermore, Your Honor, let me make two other points.
23 The principal objector with seventy-five percent of the value
24 has now stopped objecting. So we're really talking only about
25 the smaller part of the claims. And, Your Honor, to the extent

1 that the Court somehow believes that there's some merit to that
2 argument, which I don't believe there is --

3 THE COURT: I'm not suggesting --

4 MR. PEREZ: Okay.

5 THE COURT: -- that there is or there isn't. All I'm
6 saying is that you're trying to get over the hurdle of this is
7 in good faith. And one of the issues that you haven't really
8 dealt with directly is what I've been talking about which is my
9 characterization -- and I may have it wrong, by the way -- my
10 characterization of what I believe to be embedded in the SunCal
11 papers, namely, this is a device to improve Lehman's litigation
12 position in California and that that may be one of the
13 principal motivations for doing this deal.

14 MR. PEREZ: Your Honor, if as a result -- let me put
15 it this way. If as a result of undoing the structure, the
16 ownership of the assets is cleared up, then I think that's a
17 salutary effect. I can't believe that would be in bad faith.

18 THE COURT: Okay.

19 MR. PEREZ: I mean, if as a result of doing the
20 structure it's cleaned up, I can't understand why that would be
21 in bad faith. What is it that it's in bad faith about? That's
22 what I don't seem to understand.

23 THE COURT: All right. I think it's time to hear from
24 the SunCal debtors and understand exactly from them what the
25 problem is, if any.

1 And you speak softly and we have a fairly crowded
2 courtroom. If you could -- you're close to me and I can hear
3 you but please speak up so that everybody can hear you.

4 MR. O'KEEFE: Yes, Your Honor. Let me deal briefly
5 with a few of counsel's comments. As far as Article III
6 standing, you don't have to file a claim to have Article III
7 standing. The reality is to the extent that what they're doing
8 has an adverse effect on our case then we have standing to make
9 an objection. Now, we have limited our issue to that part that
10 affects our case.

11 And let me just tell you the sequence of events here
12 that led us to the conclusion. And each sequential filing in
13 this case has confirmed that fact. The transaction before the
14 Court specifically states that the MRA, the master repurchase
15 agreement, is being terminated. And just to step back from
16 that, every repo from an economic perspective is, in effect, a
17 secured transaction. It's a buy and sell that generates a
18 yield between the buyer and seller. But the simple fact is
19 that is an incredibly important market. That's how we move M1
20 and M2 on the money supply. So decisions were made twenty
21 years ago that when they say it's a true sale, no matter what
22 it looks like, it's a true sale. And this particular contract
23 says it is a true sale. And there's twenty years of case law
24 that says no matter what it looks like it's a true sale because
25 that market says it's a true sale --

1 THE COURT: We are not arguing in the context of this
2 motion to unwind the Fenway structure whether or not repos that
3 function as financings are true sales. And the question that
4 you are asserting has not been decided in this case and is not
5 being decided now.

6 MR. O'KEEFE: Well, let me just deal with the issue of
7 this transaction. The transaction in the motion says that the
8 master repurchase agreement is being terminated. That's where
9 the backup lien rights were vested in Fenway. And basically,
10 the contract says this is a true sale but if for any reason
11 it's broken, we continue to have a lien right to protect
12 ourselves in the same way as you have a lessor saying that in a
13 lease.

14 But the contract before Your Honor -- the motion
15 before Your Honor says that contract is being extinguished. It
16 says the guaranty that Lehman Brothers issued in favor of LCPI
17 to back up their repurchase obligation is being extinguished.
18 It says that the CP notes are being extinguished. It says that
19 the VFN, or the variable funding note, is being extinguished.
20 Every element of that transaction is being extinguished. And
21 it says this is in full performance.

22 Now, we then see in the pleading and in subsequent
23 pleadings, the development of the following argument.
24 Notwithstanding the fact that the guaranty goes away, there's a
25 subrogation based upon an extinguished guaranty.

1 Notwithstanding the fact that the MRA is gone, we say there's a
2 lien that they're taking based on the MRA against the sold
3 loans that are being acquired by LCPI. Transactionally, it
4 doesn't make any sense. We then point out in our papers, wait
5 a minute here. There is no reference to a financing -- a 364
6 financing in this motion. But you're referencing debt that
7 LCPI is purporting incurring and liens that it's purporting
8 giving to secure a debt which is not referenced in the motion.
9 So when you see the sequence of events, they then file a
10 supplement and said, oh well, notwithstanding the fact what we
11 said in the motion, we're reserving rights and somehow or
12 another there are these follow on liens which weren't discussed
13 or could survive under the transaction that we've enunciated
14 before the Court.

15 So at that point, it confirmed what was initially a
16 suspicion. And now they've admitted that they will assert that
17 Lehman Brothers stay a party that has -- doesn't own the loans,
18 has never owned the loans, has never had a lien on the loans,
19 will now acquire a lien based upon an extinguished contract,
20 based upon a guaranty that's extinguished, based upon a
21 transaction that is fully performed and paid.

22 So when we look at that sequence of events, we see
23 that there appears to be an underlying objective to insert LBHI
24 into a transaction and to create lien rights that really can
25 have no existence under the transaction that they presented

1 before the Court.

2 So SunCal's objective is simply to do its own
3 reorganization. And I'll address this in the next motion. We
4 don't, in any way, want to get involved in Lehman's case. We
5 haven't filed a claim. We haven't appeared here except as
6 necessary. But when someone files a motion that presents what
7 appears to be a clear --

8 THE COURT: By the way, one of the issues here is that
9 you haven't appeared here enough, that you chose to absent
10 yourself in Santa Ana taking actions that were, as confirmed by
11 the BAP panel, in violation of the stay. So maybe one of the
12 problems is you haven't been here enough.

13 MR. O'KEEFE: Well, Your Honor, I'm more than willing
14 to address that, Your Honor.

15 THE COURT: No. You don't need to. It's an aside.
16 But I'm not going to let an aside like that go without comment.
17 Just finish your argument.

18 MR. O'KEEFE: My point, Your Honor, is the motion
19 describes a transaction for the extinguishment of the MRA, for
20 the extinguishment of the underlying transaction so that there
21 would be no basis for a follow on lien by LBHI. So our concern
22 was they were designing this to get back into the SunCal cases
23 in California. And on that basis, we objected.

24 Insofar as the issue of counsel's characterization of
25 a tentative settlement that's reached with the trustee debtors,

1 seventy-five percent of the value, obviously, there's no
2 evidence before the Court with respect to that. What I would
3 say --

4 THE COURT: The evidence is the withdrawal of their
5 objection. They've withdrawn their objection and did so last
6 evening. And I accept the representation of counsel that
7 discussions are underway. Those are not before the Court. The
8 only thing that's happened is that you're now the lone
9 objector.

10 MR. O'KEEFE: Well, Your Honor, it's -- I think
11 it's -- the voluntary debtors are the loan objectors. And as
12 we'll deal with in the next motion, the reason why that
13 settlement was possible is because of the pursuit of litigation
14 in California, but for that --

15 THE COURT: That's not before me right now. The
16 question before me -- and I understand some of what you're
17 arguing. But I will tell you that some of what you've said I
18 find confusing. I don't believe that there is anything in the
19 motion before me that requires me to make any findings as to
20 the consequences in the SunCal bankruptcy of my unwinding the
21 structure. So part of what I don't understand is why you're
22 spending all this time arguing about those consequences.

23 MR. O'KEEFE: Your Honor, with that characterization,
24 I'm more than willing to sit down. I just wanted to make sure,
25 Your Honor, that in connection with the next motion, I didn't

1 prejudice any rights in this motion. Otherwise, I wouldn't
2 have said anything. But I appreciate Your Honor's
3 clarification in that regard.

4 THE COURT: Okay. I might -- let me ask Mr. Perez,
5 have I said it correctly? Is it correct that there's nothing
6 about my unwinding the Fenway structure in accordance with the
7 amended order that you have proposed that necessarily impacts
8 the characterization of anything in the SunCal bankruptcy case?

9 MR. PEREZ: Your Honor, I think that's correct, Your
10 Honor. I believe the -- once the transaction is unwound, we'll
11 be in a position -- we'll be in the position that we find
12 ourselves. But I don't think you're making any finding with
13 respect to the SunCal and what our position is in the SunCal
14 case.

15 THE COURT: All right. With that clarification, maybe
16 the objection for the time being fades away. And I think it's
17 time to hear from the creditors' committee particularly as it
18 relates to their review of the transaction and their
19 reservation of rights with respect to certain parties, notably,
20 Hudson Castle and the Fenway parties.

21 MR. O'DONNELL: Yes, Your Honor. Dennis O'Donnell,
22 Milbank Tweed Hadley & McCloy on behalf of the official
23 creditors' committee. Your Honor, as Mr. Perez said, we have
24 spent a lot of time with this motion on several different
25 levels. Just as a preliminary matter, in terms of business

1 judgment, we think that -- we're totally convinced that the
2 business judgment of the debtors here makes sense.

3 There are, I think, two business purposes. One is to
4 simply making the management of the loans easier. I mean, we
5 can speak to that from the context of transactions we've been
6 involved in with respect to Fenway loans where the extra level
7 of having Fenway involved made things much more complicated and
8 time consuming. So there is that business purpose.

9 The second business purpose is simply to confirm the
10 ownership of these loans in LCPI which is significant for lots
11 of purposes, one of which might have some consequence in the
12 SunCal proceeding, but it has other purposes as well. So to
13 the extent we're looking for a business purpose here, there are
14 several fairly compelling business purposes separate and apart
15 from whatever the SunCal debtors have to say.

16 We did look at the motion on other levels as well.
17 And our particular focus from the get-go was on the actual
18 nature and structure of the transaction and the parties
19 involved. And specifically, the involvement of Hudson Castle.
20 Even before the audit call that appeared in the Times a few
21 weeks ago appeared, we had been asking questions about the
22 nature of the transaction, the intents of the transaction, how
23 it was put together, how it unfolded. That article provoked us
24 to look even harder at that relationship. And subsequent to
25 that, we spent a two-week period talking to the debtors and

1 talking directly to Hudson Castle and its counsel trying to get
2 a better understanding of the relationship between Hudson
3 Castle and Lehman and precisely how the Fenway structure was
4 put together and modified over the summer of '08.

5 That investigation is ongoing. We haven't had all our
6 questions answered yet. But the ones we have answered have
7 convinced us that we have no reason to oppose the current
8 motion. And that's the case because the releases provided to
9 Fenway and Hudson Castle in this motion are very limited. We
10 had already started the process of limiting those releases.
11 But subsequent to further investigation, we narrowed them
12 further. And all that's getting released at this point is any
13 claims arising out of -- and Ms. Goldstein can correct me if
14 I'm incorrect on this -- but, basically speaking, not the
15 specific language, any claims arising out of the administration
16 or management or origination of the underlying loan
17 collateral -- which we believe Hudson Castle likely had nothing
18 to do with. All claims relating to the actual structure of the
19 Fenway transaction and Hudson Castle's involvement in it are
20 being preserved for future investigation. And with that
21 understanding and our understanding and acceptance of the
22 business judgment here, we believe the motion should be granted
23 by the Court.

24 THE COURT: All right. Thank you. Is there anyone
25 else who wishes to be heard in connection with this?

1 MR. MILLER: Good morning, Your Honor. I'll be very
2 brief. My name is Skip Miller. I'm the litigation attorney
3 for the SunCal debtors. I, obviously -- and I'm not a
4 bankruptcy lawyer. I obviously don't want my lawsuit, my
5 equitable subordination lawsuit encumbered or made any more
6 difficult than it already is by virtue of this compromise
7 motion. That's my only concern. The exact questions that Your
8 Honor asked at the beginning of the hearing are my concerns as
9 well. Other than that, we don't have any objection or
10 reservation.

11 This tentative settlement from the trustee's side, Mr.
12 Lobel's side, is great news to us. If it sticks, if it's
13 good -- I don't know the details of it. But this is obviously
14 something that has grown out of my lawsuit, my equitable
15 subordination lawsuit. And I want to just be able to continue
16 with it in Santa Ana before Judge Smith not in any way, shape
17 or form intruding on the stay or the jurisdiction of this
18 Court. And that's our position.

19 THE COURT: Let me just ask you one question.

20 MR. MILLER: Sure.

21 THE COURT: Who do you represent in that litigation?

22 MR. MILLER: I represent all of the debtors, the
23 voluntary and involuntary debtors -- the trustee debtors and
24 the voluntary debtors as special litigation counsel.

25 THE COURT: And as special litigation counsel, you

1 heard for the first time this morning that the trustee has
2 worked out something that may result in a settlement of at
3 least that party a lawsuit, is that correct?

4 MR. MILLER: No. I spoke to Mr. Lobel about it last
5 Friday. And we've been discussing it. But I have not seen the
6 term sheet yet and I don't know the nitty gritty of the details
7 of it. So -- but he called me on Friday and we had a
8 conversation about it.

9 THE COURT: I don't want to get into the specifics of
10 it. It will either, as you say, stick or it won't.
11 Presumably, it will stick. And at least that part of the
12 litigation goes away.

13 MR. MILLER: I mean, what I heard sounded okay. I
14 just need to see -- you know, the devil is in the details.
15 And, you know, it's about half the case. It's the involuntary
16 debtors, the trustee debtors. We still have to deal with the
17 other half of the case. And we're working hard on it. And my
18 lawsuit, quite frankly, is the driver of all of it.

19 THE COURT: Well, I know that's your perspective. I
20 don't know if it's true or not. And I'm not approving your fee
21 so it doesn't matter.

22 MR. MILLER: Thank you, Your Honor.

23 THE COURT: All right.

24 MR. MILLER: Appreciate it.

25 MR. PEREZ: If the opposition is withdrawn, I'll sit

1 down, Your Honor. Otherwise, I've got a couple of comments to
2 make.

3 THE COURT: I think there's no one -- well, let me
4 find out. Is there anyone else who has a comment about this
5 pending motion? Apparently not. Mr. Perez?

6 MR. PEREZ: Yeah. Just a couple, three comments, Your
7 Honor. Number one, one of our exhibits is a letter going back
8 to January of this year where we informed the SunCal debtors
9 that LBHI had an interest in these assets through the CP notes.
10 I mean, there's no question about it. The record is clear.
11 This is not anything new or different.

12 And furthermore, Your Honor, our motion clearly
13 contained a full reservation of rights of the debtor so that we
14 wouldn't affect the distribution among the various debtors'
15 estates. And that's precisely what we're trying to do. Thank
16 you, Your Honor.

17 THE COURT: Okay. Having heard the argument presented
18 by the debtors, the support of the creditors' committee and the
19 opposition by the SunCal voluntary debtors, which appears to
20 the Court to have been more in the nature of a reservation of
21 right as to the potential consequences in the SunCal bankruptcy
22 case in California to approval of the unwinding of the
23 structure, I am satisfied that sufficient business
24 justification has been presented to approve the motion and that
25 the undoing of the structure results in a number of claimed

1 benefits to the estate including the elimination of certain
2 costs and the preservation of the rights of separate debtors so
3 that the distribution rights of those creditors looking to
4 particular members of the Lehman corporate family will
5 unaffected by the approval of a settlement.

6 I'll entertain an appropriate order.

7 MR. PEREZ: Thank you, Your Honor. Should I tender
8 the order now or --

9 THE COURT: At the end of the hearing.

10 MR. PEREZ: Okay. Thank you, Your Honor. Your Honor,
11 the next matter on the docket is the motion to lift stay.

12 (Pause)

13 MR. O'KEEFE: Good morning again, Your Honor. Sean
14 O'Keefe appearing on behalf of the SunCal debtors, the
15 voluntary debtors. Your Honor, I'm a Chapter 11 reorganization
16 lawyer and my objective is simply to reorganize the cases that
17 I have been assigned to. In the current context in California,
18 it's an inherently difficult process because this is a large
19 land case and we are facing the largest property value of the
20 clients since 1930. We also have a substantial secured
21 creditor. The overlaying variable on that is that there is a
22 litigation ongoing with that secured creditor. But our
23 objective is not in any way to do anything other than to
24 reorganize under Chapter 11 in our case. And I can't emphasize
25 that enough.

1 Insofar as the characteriz --

2 THE COURT: Can I break in and ask a question?

3 MR. O'KEEFE: Yes, Your Honor.

4 THE COURT: Are you personally involved in the appeal
5 of the BAP decision to the Ninth Circuit?

6 MR. O'KEEFE: Yes, I am. I'm the principal lawyer,
7 Your Honor.

8 THE COURT: Are you the lawyer of record?

9 MR. O'KEEFE: Yes.

10 THE COURT: And what's the time horizon of briefing
11 and adjudication in the Ninth Circuit?

12 MR. O'KEEFE: Your Honor, my recollection now is
13 briefing is complete. But they don't tell you when they will
14 set oral argument or if they're going to have oral argument.
15 It's entirely possible that could take months or as much as
16 nine months. So I just finished two appeals. And as a general
17 rule, it takes a significant period of time. So I don't
18 exactly know when they're going to set oral argument or whether
19 they're going to rule simply on the papers. But they haven't
20 provided us that.

21 THE COURT: Now, I take it that it's your position on
22 behalf of the voluntary SunCal debtors that the BAP panel got
23 it wrong when the BAP concluded that the SunCal debtors needed
24 to come to this court to obtain stay relief in order to
25 prosecute the equitable subordination litigation in the

1 bankruptcy court in California. Is that right?

2 MR. O'KEEFE: No, Your Honor. That -- there is no
3 question in my mind that the home bankruptcy court determines
4 the scope and application of the stay, as the BAP said, in the
5 final resolution. So, for example, there was just a case, it's
6 a published decision, where the Supreme Court in New York made
7 a decision regarding whether or not the stay applied in that
8 particular case. Every Court that confronts the stay has to
9 make a determination does the stay apply on these facts.

10 THE COURT: Yeah. But I'm trying to understand
11 whether or not in appealing the BAP decision, you're arguing
12 that the BAP got it wrong when the BAP concluded that Judge
13 Smith got it wrong when she concluded that you could properly
14 prosecute equitable subordination litigation against the Lehman
15 debtors without first obtaining stay relief here.

16 MR. O'KEEFE: Not the procedural issue but the
17 substantive issue. Basically, our position is -- is consistent
18 with what we read to be the law in this circuit. And in the
19 Ninth Circuit, but for that one case, that the pursuit of an
20 equitable subordination action whether through a contested
21 matter or through an adversary proceeding is deemed defensive
22 and consequently that does not violate the stay.

23 The second issue as to who gets the final say on
24 whether the stay applies, we absolutely agree that the home
25 bankruptcy court makes that decision. So now we have a

1 circumstance, we believe -- and we have absolute confidence
2 that the BAP will be reversed. We think Judge Markell's
3 decision states the law.

4 THE COURT: Are you saying you have absolute
5 confidence that the BAP will be reversed?

6 MR. O'KEEFE: Yes, Your Honor. Yes, Your Honor. I
7 just think that --

8 THE COURT: That's an unbelievable statement to make
9 on the public record.

10 MR. O'KEEFE: Your Honor, the -- it is a decision
11 which we think is directly contrary to the authorities of that
12 circuit and we don't think that it will stand both
13 jurisdictionally and substantively.

14 But we agree -- we agree, Your Honor, that if the
15 determination of whether the stay applies in the final
16 determination -- and that's what the BAP said. And the final
17 determination is Your Honor. So we absolutely agree. So, for
18 example, Lehman had the right to come back here and say there's
19 this determination and we think it's in error. And had Your
20 Honor said I think so, too, then that's it. We're stumped.
21 There's no question there. We operated from that point going
22 forward because Lehman raised the issue -- Lehman raised the
23 issue with Judge Smith. Lehman filed the motion for relief
24 from stay and said, Judge, we're making a motion under (d) (2)
25 and (d) (3) that says this reorganization automatically fails

1 because our stay prevents them from subordinating our claims.
2 Faced with that argument, Judge Smith said, well, that's not
3 the law in this circuit. And also we have the Meddium (ph.)
4 decision and Your Honor's decision in Shinsei. And maybe we
5 are misreading that. But --

6 THE COURT: I think you are reading the Shinsei
7 decision.

8 MR. O'KEEFE: And that's entirely possible, Your
9 Honor. But I do believe that Judge Smith's decision based on
10 their argument, and it was in response to their argument, she
11 said I see, under (d)(2), an ability to reorganize pursuant to
12 which they can seek to subordinate your claims. And on that
13 basis, we proceeded. So they raised the issue and she ruled on
14 it.

15 Now the BAP took that issue up -- and they didn't seek
16 to set aside the order denying motion for relief from stay.
17 They appealed just that narrow ruling, that issue of law, as to
18 whether or not the stay was affected by an equitable
19 subordination action, whether that was offensive or defensive.
20 Prior to that point in time, we believe the law was clear that
21 it was defensive. They view it, the BAP did, as offensive.

22 But --

23 THE COURT: That's consistent with Judge Gonzalez'
24 decision in the Enron case as well.

25 MR. O'KEEFE: Your Honor, I think the correct

1 statement of the law is what was stated in the Meddium decision
2 because I think what the Court is saying is, look, if you come
3 to a case, we have to be able to determine the priority of your
4 claim. And that's really what's going on here. Integral to
5 our reorganization effort, we have to deal with the claims that
6 they filed in our case. Conceptually, I think we can all agree
7 that we could have objected to their claim, raised an unclear
8 hands defense and a recoupment defense and, on the basis of
9 those equitable affirmative defenses, sought subordination.

10 THE COURT: I understand --

11 MR. O'KEEFE: It's just that --

12 THE COURT: I understand your position on that. But
13 one of the issues here is that through other counsel, in
14 November of 2008, the SunCal debtors brought a motion for stay
15 relief here which I denied without prejudice. It was very
16 obvious, I think, to anybody who was present in court,
17 including your partner, that one of the problems with the
18 original motion was that overly broad, it didn't seek
19 particularized relief. And from the very beginning of the
20 SunCal bankruptcy, it was apparent that SunCal needed to deal
21 with Lehman Brothers. I made it very clear that I would
22 entertain other motions for stay relief or stipulations that
23 the parties might enter into relating to stay relief.

24 But nothing happened. Except in January of 2009, I
25 was involved in an emergency hearing, I believe it was on a

1 Friday afternoon, New York time, seeking to enforce the stay
2 because, in effect, your debtors were treating this Court as if
3 it had no say in the matter. Ultimately, I made some
4 threatening noises on the record, and the record speaks for
5 itself, that there might well be sanctions for a willful
6 violation of the automatic stay. And until now, the SunCal
7 debtors have absented themselves from this court. That's one
8 of the reasons why I interjected earlier in your argument on
9 the Fenway motion about your not having been here except when
10 you needed to be here. I think you needed to be here a lot
11 sooner. And I'd like an explanation as to why you haven't been
12 here sooner.

13 MR. O'KEEFE: The first thing is, Your Honor, to the
14 extent that we have engaged in any course of conduct that was
15 offensive to this Court or that affected the stay, we sincerely
16 apologize. That was not our point. To the contrary, I've been
17 practicing bankruptcy law in twenty-five years -- for twenty-
18 five years and nobody has ever accused me of violating the
19 stay.

20 What happened in this circumstance was, Your Honor, we
21 moved for -- the circumstance you're referencing -- and I'll
22 just go back. Twenty years ago, I had a case, and it was only
23 one in my whole career, where we had two cases, two debtors,
24 who were looking at each other saying well, my stay applies and
25 your stay applies. And we went to Mr. Klee (ph.) and Mr.

1 Tweester (ph.) because there were no cases anywhere on the
2 issue that confronted that circumstance and said well, what
3 happens, who has primacy. And their response was the Code
4 doesn't work very well under those circumstances.

5 Well, since then, we've had more input from the case
6 law. But the truth of the matter is, Your Honor, we've never
7 run into this circumstance before. And insofar as that hearing
8 you're referring to, we moved the use of cash collateral in
9 that case and that was the issue that Your Honor is speaking
10 to. And Your Honor told us I think that violates the stay and
11 we withdrew that motion. The reason why we filed that motion
12 is because there was another pending Lehman case, LB Rep,
13 something or other, and it was represented by the same counsel.
14 And the trustee in that case moved for the use of cash
15 collateral and there was no stay assertion.

16 Now, going all the way back to the first motion for
17 relief from stay, Your Honor is absolutely correct. And I
18 wasn't involved in that. That motion was early in this case.
19 And it basically was this blanket prayer for relief. I don't
20 really understand why that motion was filed in that structure
21 particularly given the fact that this was early in this case.
22 It was going to be denied. It should have been more focused
23 and Your Honor made that clear.

24 But insofar as that particular issue, the motion for
25 use of cash collateral, Your Honor made your thoughts clear on

1 that and we withdrew the motion. And that was very difficult
2 in a Chapter 11 to operate without the use of cash collateral
3 particularly since the party who controlled the cash collateral
4 or alleged that they controlled it was trying to crush our
5 case. The next thing that happened in time, Your Honor, is
6 they raised the issue before Judge Smith. They filed the
7 motion for relief from stay saying our stay thwarts their case.
8 You cannot succeed. You might as well give us relief from stay
9 to foreclose on everything because they can't reorganize,
10 period, because of our stay. That was the argument. It was a
11 (d)(2) and a (d)(3) argument.

12 In response to that, we presented -- and in response
13 to that, we presented our arguments and our case law saying
14 that the stay didn't apply, that this was a defensive act and
15 we could subordinate their claims. And the claims objection in
16 priority determinations are traditionally to the extent they
17 just affect the claim deemed defensive. And Judge Smith
18 specifically ruled on that. It was only within the protection
19 of that ruling that we proceeded. Now, Your Honor, they had
20 the option to come to you and say, look, we think this is
21 wrong. And whatever Your Honor said, that's the law. That's
22 it. We agree. There's no dispute. But they didn't do that.
23 In fact, thereafter, they affirmatively represented to Judge
24 Smith over and over again the stay doesn't apply. In fact, I
25 will tell you that I went to court once to complain that the

1 motion -- the agreement we entered into -- because when Your
2 Honor said we couldn't move for the use of cash collateral, we
3 had to enter into a very onerous financing agreement. And what
4 was discovered after the fact is that they didn't hold the lien
5 or even the claim. And so, when we went in again, I said you
6 know, there's something unfair about this. They invoked the
7 stay with respect to a loan and a lien they don't hold and now
8 I'm stuck with this onerous financing agreement which they
9 should never have had in the first place because that's not
10 their lien.

11 At that point, Mr. Pachulski, an exceptional lawyer,
12 jumps up and scolds me in front of Judge Smith and says that
13 stay has not been an issue in this case for months. And that's
14 in their disclosure statement.

15 So maybe it was incorrect for us to rely on Judge
16 Smith's ruling. But they invoked that issue. And she
17 responded and ruled. And we, in reliance on that, went
18 forward. And they could have come to Your Honor and said Your
19 Honor has the final say and we agree. There's no dispute. But
20 they didn't do that. They said the stay does not apply over
21 and over again. And it's in their own pleadings.

22 So to the extent that we have proceeded in a manner
23 that's procedurally inappropriate, we apologize. That was not
24 our intent. We thought we were doing the right thing. And I
25 have to tell you, Your Honor, I'm a debtor moving for relief

1 from stay. That just seems -- I mean, it's just a new thing
2 for me and for everybody out there. There just isn't a lot of
3 case law on this.

4 THE COURT: Mr. O'Keefe, I understand your position.
5 But here's the concern that I have and it's actually the
6 flipside of the argument that you were making in the context of
7 the unwinding of the Fenway Capital commercial paper program.
8 And that's the question of good faith. I couldn't have been
9 clearer in January of 2009 that this was the Court that you
10 needed to come to for purposes of getting stay relief, in that
11 instance, relating to the use of cash collateral.

12 But it's now May of 2010. It's quite a long while
13 after that. And one of the concerns I have is that Judge Smith
14 and I are players in a cross-country game of gaming the system,
15 of using courts to your particular purpose in order to gain
16 strategic advantage. And speaking for myself, I don't like
17 that. I suspect that Judge Smith would say the same thing if
18 she were here.

19 MR. O'KEEFE: Your Honor, all I can do is apologize.
20 The reality is there was a ruling; we did rely on that. They
21 did have their procedural remedies. Maybe in retrospect that
22 was not the right thing to do but rather to take that and
23 immediately come back here. And in retrospect, given Your
24 Honor's insight, that's what I would do.

25 THE COURT: Let me ask you a question. Assuming that

1 you are successful in the Ninth Circuit whenever that happens,
2 what's the consequence of that successful prosecution of the
3 appeal of the BAP decision to the Ninth Circuit? What happens
4 then? Does it moot my need to decide the pending motion?

5 MR. O'KEEFE: Your Honor, I don't think it does. And
6 this is just my analysis of the law. Essentially, the BAP was
7 correct in one respect, that, procedurally, to the extent that
8 there is a final determination who trumps everybody insofar as
9 the determination relative to the scope and application of the
10 stay, it is the home bankruptcy court. So if you make a
11 determination with respect to that issue, then our only
12 recourse is to appeal. That's it. That's the only option we
13 have.

14 The mechanical -- the effect of the BAP being
15 overruled is there is a case in the Ninth Circuit which
16 determines that a particular course of action in isolation --
17 and again, they didn't appeal the merits of the order denying
18 the motion for relief from stay. And subsequently, we brought
19 to them they didn't even own these loans so the motion
20 shouldn't have been brought in the first place. So that's our
21 jurisdictional issue. But if -- and we believe the Ninth
22 Circuit will reverse this, even if just on jurisdictional
23 grounds to say why are you here. The motion shouldn't have
24 been brought, the appeal wasn't valid. It's all vacated.

25 But what we think will happen is we'll clarify the law

1 in our circuit. And that's really, at this point, what we're
2 trying to do. Insofar as your determination, the reality
3 issue, Your Honor, we have no dispute that to the extent the
4 stay applies, the home bankruptcy court gets to say it applies.
5 And you trump everybody else. And at that point it's solely --

6 THE COURT: I'm asking you a slightly different
7 question. And you may have answered it and I just didn't fully
8 understand the answer. If you are successful in the Ninth
9 Circuit, would you be able to prosecute the litigation against
10 the Lehman debtors for equitable subordination in the
11 bankruptcy court in Santa Ana without obtaining stay relief
12 here? That's a yes or no question.

13 MR. O'KEEFE: Under Baldwin-United, yes, Your Honor --

14 THE COURT: In that case --

15 MR. O'KEEFE: -- unless --

16 THE COURT: -- then the Ninth Circuit adjudication
17 could moot the pending motion here, correct?

18 MR. O'KEEFE: If Your Honor --

19 THE COURT: That's a yes or no question.

20 MR. O'KEEFE: It would depend upon the ruling, Your
21 Honor.

22 THE COURT: That's a yes, no or I don't know.

23 MR. O'KEEFE: I would say yes, if it's before the
24 ruling. Yes, because if they decide that the BAP is overruled,
25 then at this point, Judge Smith's ruling with concurrent

1 jurisdiction, but not final -- Your Honor gets the trumper, we
2 agree with that -- every Court has the right to determine
3 whether the stay applies. So if she determines the stay
4 doesn't apply and nobody comes back here then that's the law of
5 our case and we proceed on that basis.

6 The -- so it would be a timing issue. Now, on the
7 other hand, if Your Honor were to determine the stay doesn't
8 apply, okay, then the Ninth Circuit would potentially --
9 someone could argue it's an Amwell (ph.), maybe that moots that
10 issue because the home bankruptcy court has ruled it doesn't
11 apply. We were not -- we want that decision vacated for a lot
12 of reasons.

13 But I think that would be the result. So I think it's
14 a timing issue. And I don't mean to be evasive, Your Honor,
15 but -- I mean, the bottom line is we do need a resolution and
16 we're looking to Your Honor to give us that.

17 I would note that subordination -- basically, dealing
18 with these claims, a lien priority dispute, is integral to the
19 plan of reorganization. It's going to be very difficult for us
20 to reorganize without resolving the claims against the estate.
21 At this point, Your Honor, all the folks, the defendants, are
22 all nondebtors, all nondebtors. This motion -- this
23 transaction is bringing them, they believe, back into that
24 case. Now, what Judge Smith did was say, okay. I agree. The
25 BAP controls; LCPI has to leave. So she dismissed them;

1 they're gone. There are no debtors in the litigation. The
2 issue is do they get, through this transaction, to just come
3 right around and buy a claim, in effect, go right back to Judge
4 Smith and say I'm sorry, we're here again. We still get to
5 thwart the litigation which has a material adverse effect on my
6 ability to confirm a Chapter 11 plan. And that's really in our
7 mind what's going on here because they're all nondebtors.

8 Now, the whole argument, Your Honor, that we're the
9 aggressor in this -- Your Honor, there's only ten lawyers at
10 Winthrop Couchot. And only two and a half, on a good day, can
11 work on this case. These folks have hundreds of them. These
12 are the two largest bankruptcy firms in the United States. I'm
13 working seven days a week, get up at 6:00 on a Saturday morning
14 and they have unlimited resources. So if the concept is that
15 I'm kicking them around like a can, that's not happening. It
16 is absolutely to the vice versa.

17 THE COURT: You can put this on your website, it's
18 good for marketing.

19 MR. O'KEEFE: Your Honor, the merits of the claim that
20 LBHI stay will apply premised upon the contention that they're
21 going to attach a lien to the loans. And I've already gone
22 through that. They stated in their motion, the MRA is gone,
23 and that's the basis for the lien. They state that the
24 guarantee is terminated. They state that the CP notes are
25 terminated. So this is some sort of leap-springing lien that I

1 don't understand. And it's a lender of a lender. That is too
2 indirect for the stay to apply.

3 And, also, to the extent that that's their design.
4 You shouldn't be able to buy into a piece of litigation that's
5 going on in a bankruptcy court and then stand up and say you
6 know what, I knew it was happening, but I'm here and you're
7 stayed. That's just something wrong with that.

8 Your Honor, we've had a back and forth relative to
9 whether or not a subordination action is subject to the
10 automatic stay. We can all agree that a claim objection is not
11 subject to automatic stay. And a claim objection can
12 effectuate the complete disallowance of a claim. If the claim
13 is disallowed the lien goes away.

14 What we're trying to do is to subordinate to the
15 extent necessary to deal with the creditors who they've created
16 by authorizing work. We don't think that is subject to the
17 stay. Your Honor may have a different opinion. But if that's
18 the case, I would simply say to Your Honor that it's very
19 difficult to do a reorganization if you can't deal with claims
20 and liens against your estate.

21 So conceptually both cases should be able to proceed.
22 And Your Honor should be able to fashion, and I note that the
23 creditors' committee, although they object to this, say as a
24 secondary position that Your Honor could have a reporting
25 system or other controls that would assure that your case was

1 not affected. But it can be that a grader or a framer in
2 California doesn't get paid and the creditors in this case gets
3 paid. There has to be a medium where they both can proceed.

4 The problem that we have from a balance of the harms
5 perspective, and basically our orientation under Sonnex was,
6 these huge properties are sitting there. Every weekend I drive
7 passed one. And it is this giant expanse of land with dust
8 blowing around in the midst of a city. And there are fire
9 issues, there are flood issues, there are dust issues. We
10 can't solve that problem until we deal with this claim. So
11 delay has a material affect on our asset and theirs. Nobody
12 gains by delay. This is not a solution, it is simply a -- in
13 our estimation an issue of litigation leverage. The pricing of
14 a future settlement, and that's not a basis -- that is not a
15 harm for them. But it is a severe harm for us. I don't know
16 that we don't have relief from stay.

17 THE COURT: All right. Let me just see if we can
18 accelerate through the rest of your argument. Because we've
19 been going at this for a long time, and we have a very full
20 courtroom still.

21 MR. O'KEEFE: I apologize, Your Honor.

22 THE COURT: No, you have nothing to apologize for.
23 But as you point out you're not exactly a party-in-interest
24 here.

25 MR. O'KEEFE: Well --

1 THE COURT: You're a party-in-interest, representing
2 the interest of the SunCal debtors and I appreciate that. But
3 I think we need to move it along.

4 MR. O'KEEFE: Then I would simply submit to the Court
5 as we've gone through in our briefs, that to the extent the
6 stay applies, to the extent that Your Honor determines that it
7 does apply, Your Honor should lift the stay to the extent
8 necessary to allow the action to proceed.

9 One of the points that Mr. Miller made was there is a
10 settlement. Your Honor, this case will settle. I can't
11 guarantee that for sure. But the reality is there is a dynamic
12 here, the parties where they initially weren't talking, now
13 they are talking. The truth of the matter is, the stay will
14 just cause delay, it will shift litigation leverage and it
15 isn't a solution.

16 So we have addressed the Sonnax factors, we are asking
17 for limited relief from stay. To the extent that we've
18 offended the Court I sincerely apologize, that was certainly
19 not our intent. We thought we were doing the right thing.

20 THE COURT: Okay.

21 MR. O'KEEFE: Thank you, Your Honor.

22 THE COURT: Apparently Mr. Miller is going to be
23 brief.

24 MR. MILLER: Be very brief. Learning more about
25 bankruptcy law and bankruptcy stays than I ever knew before.

1 Your Honor, I just want to very briefly, because I
2 think it's been well addressed. I just want to answer Your
3 Honor's question about, you know, why didn't you come back
4 sooner? And this is from my perspective as a trial lawyer, a
5 litigation lawyer, not a bankruptcy lawyer.

6 In March of '09, Judge Smith -- I was there, they
7 moved for relief from stay so they could foreclose. And Judge
8 Smith in her order, I'm quoting, says "that her court has
9 concurrent jurisdiction to determine the scope or applicability
10 of the automatic stay under 11 U.S.C. 362(a)." And she said
11 "the automatic stay arising from the bankruptcy case of Lehman
12 Commercial Paper does not apply to any proceeding to
13 subordinate the claim of Lehman Commercial Paper and/or to the
14 transfer of the lien," so forth and so on.

15 So, you know, we won, we thought we were golden, and
16 to the extent we should have come back here -- this is my take
17 on it, we should have come back here with this order since I
18 gather from my lesson this morning this Court has the final say
19 on the debtor before this Court's stay. We probably should
20 have come back here with this order. And to the extent we
21 didn't, we're sorry.

22 The BAP then reversed at the end of the year. And
23 when the BAP reversed we had this ruling from Judge Smith that
24 LCPI had sold the loans to Fenway, all of them. So it didn't
25 seem like LCPI was part of the case anymore, or that the stay

1 was implicated.

2 Then we get this compromise motion, and we say whoa,
3 this compromise motion brings LCPI and Lehman entities back
4 into the picture, we better fire up our motion for relief from
5 stay. So here we are, okay. Here we are. And to the extent
6 we should have done it sooner, we should have done it sooner.
7 But there was no intent, at least from my perspective, to ever
8 avoid or evade the jurisdiction of Your Honor, and, Your Honor,
9 the stay in this court. Okay, so that's number one.

10 Number two, very briefly. My ultimate -- I'm
11 representing the debtors, but my ultimate clients are, like Mr.
12 O'Keefe said; the grading contractor, the drywall, the guy that
13 does the sidewalks, the retaining walls, they're all in
14 California, all the documents are in California. We filed our
15 lawsuit in January of '09. We've virtually completed document
16 discovery. Mr. Lobel's been working real hard, and I'm hoping
17 this settlement sticks for part of the estates, frankly. I'm
18 hoping it seeps over to the other estates, if we can work that
19 through. I'm working with him and with his office, and it's
20 going to take a lot more work, but I don't want to change the
21 playing field. And that's why we're here, Your Honor. We want
22 to be able to maintain the playing field as it is right now.
23 I've got my lawsuit, we're litigating equitable subordination.
24 I'm beginning to think they think we have a pretty good case
25 based on what I'm hearing on this settlement that Mr. Lobel's

1 been negotiating, but, you know, I'll put that on my website or
2 something.

3 THE COURT: No, I suggest you don't do that.

4 MR. MILLER: I just want to be able to keep it going
5 and not have to go back to California and say well, we're going
6 to try the case there against the nondebtors, because there's
7 no stay implicated. But then we've got to take some of the
8 same creditors and come back to Your Honor, and basically retry
9 the same case and do it twice. And that's exactly -- I was
10 reading the papers on the plane, in a footnote that's exactly
11 what they say they -- that's exactly what they suggest. They
12 suggest that they could have requested that the entire
13 equitable subordination be tried before this Court, but they're
14 not. They just want the LCPI piece here and I guess the
15 nondebtor piece in California. That doesn't make any sense.
16 That is -- I think that's gaming the system. That's just a
17 litigation tactic, it's clever, very smart lawyers. But it's
18 just repetitious, duplicative.

19 I'm sure this Court is, you know, very, very busy. I
20 know Judge Smith is very busy, because I've spent half of my
21 life there over the last year. And I would just request Your
22 Honor to enter relief to the extent it's necessary so that we
23 can do it all in California.

24 THE COURT: All right.

25 MR. MILLER: Thank you, Your Honor.

1 MR. PEREZ: Your Honor, Alfredo Perez. A couple of
2 comments.

3 I hear counsel saying that they believe that the home
4 court has the last say on the automatic stay. Unfortunately, I
5 believe that their actions really don't support that.

6 And, in fact, Your Honor, if the Court looks at the
7 equitable subordination claim, one of the predicate acts, if
8 you will, to the liability for equitable subordination is --
9 are improper attempt to enforce the automatic stay before this
10 Court. So it's completely -- this pleading completely belies
11 the mea culpas that we've heard this morning.

12 Second, Your Honor, as it relates to whether the stay
13 apply, I don't believe that there's any question but that the
14 stay does apply. The BAP found that the stay applies, in
15 connection with their equitable subordination claim. I mean,
16 what they really want to do, is they really want to strip our
17 lien. It's not the situation that you had before Judge Drain,
18 where you're reordering priorities. And I read Shinsei three
19 times and the Court basically says under these circumstances
20 involving Japanese law, it's limited to these facts. I don't
21 think that's a broad ruling that equitable subordination is
22 defensive in every ruling. Judge Gonzalez's ruling in Enron
23 says it's affirmative. So I don't believe that there's any
24 question about the fact that the stay does apply.

25 Now, let me address what I believe is the key Sonnox

1 factors, and that is balancing of the harm. Your Honor, at
2 this point -- and we could have, by the way, I'll take up Mr.
3 Miller's point. I mean, we could have requested that the whole
4 thing be moved here. And as a practical matter, we didn't
5 think that was appropriate because, first of all, in view of
6 this Court's docket and the fact that it's basically their
7 claim. So we didn't think that was appropriate.

8 But we also don't think it's appropriate for the stay
9 to be lifted at this time. There may be an appropriate time
10 for the stay to be lifted. But there are probably three or
11 four -- what I think are very compelling reasons why the stay
12 shouldn't be lifted.

13 The first one is, Your Honor, we need to see the
14 settlement through. We need to see what ends up at the end of
15 the day. Now, there are -- there has been LCPI loans that
16 weren't in Fenway, that have always been the subject of the
17 stay regardless of the Fenway deal. So we really need to see
18 that settlement through.

19 We also need to see what the BAP does. I mean -- and
20 I think the Court's --

21 THE COURT: I think you mean what the Ninth Circuit
22 does.

23 MR. PEREZ: What the Ninth Circuit does, I think
24 you're -- and I think Your Honor's play was absolutely upright.
25 And, frankly, if I was in Mr. O'Keefe's shoes I probably would

1 have done the same top dance in response to your question.
2 Because I think the answer based on their papers is yes. It
3 would moot it. I mean, that's basically what they were telling
4 you. Yes, if you read their papers, that's what they said.
5 That's number one.

6 Number three, Your Honor, I mean we are regardless of
7 whatever anybody says, at a critical time in this case. I
8 mean, filed a plan, we filed a disclosure statement, going to
9 file the motion to approve the disclosure statement hopefully
10 this Friday. That's one of the things I'm going to do when I
11 get back. And we're going to prosecute the plan. And it's
12 going to take a while, but we're affirmatively going to
13 prosecute the plan.

14 And to the extent that we are able to resolve the
15 thing with seventy-five percent of the value, I think that's --
16 that's going to instruct a lot better as to how the balance
17 gets resolved. And continuing to litigate in my mind
18 doesn't -- I mean, it's great for Mr. Miller to come up here
19 and take credit, you know, for something that he learned about
20 on Friday, that's terrific. But the fact of the matter is is
21 that despite those efforts, I mean we are trying to reach
22 resolution. We're trying to reach a resolution with all our
23 constituencies, that's not something that we take lightly.

24 I mean, if our goal was to litigate, Your Honor, as
25 the Court well knows, you know we could be here 24/7, you know,

1 until we're both very old. And that's not our goal. I mean,
2 our goal is to try to resolve these matters as expeditiously as
3 possible. And I think we are making progress.

4 So, Your Honor, at a very minimum I would request that
5 the Court defer the stay. I think the Court should deny at
6 this time, without prejudice, and let them resurge their
7 motion.

8 And, by the way, Your Honor, the thought that they
9 can't craft a plan that they do come back here and say this is
10 our plan, we'll set up a litigation trust, we'll do whatever.
11 I mean, that's what people -- that's what people normally do.
12 And come to Your Honor and say you know, we'll -- we want the
13 stay lifted so we can prosecute this plan, this sets up the
14 litigation trust. I don't see any reason why something -- and
15 basically the Court had invited them to do that. And they
16 haven't done it.

17 So for all those reasons, Your Honor, we think the
18 motion should be denied.

19 THE COURT: Is there anything more?

20 MR. O'KEEFE: Your Honor, just one minute. Counsel's
21 comparative with a balance of harms is that they need
22 apparently an allocation of resources relative to filing their
23 plan. Certainly, they have more than sufficient resources
24 between the firms that they have working on this, and they also
25 have a professional firm managing the debtors' liquidation.

1 In contrast, the balance of the harms, the delay on
2 our part, is the properties, Your Honor. These are huge pieces
3 of property that probably stretch from here to the Hudson.
4 So -- I mean, some of these are ten thousand acres. They're in
5 the midst of cities, there are material issues that we have
6 addressed. So there is a fundamental difference, the balance
7 of the harms tip sharply in our favor.

8 Insofar as the concept of settlement should delay the
9 litigation, certainly Your Honor has participated in this
10 process on both sides of this to see that litigation, if there
11 is a stay, the settlement might go away, or alternatively it
12 will change. Certainly, the litigation is a driver for
13 settlement and it will expedite that process to our mutual
14 benefit. Thank you, Your Honor.

15 THE COURT: All right. This took quite a bit longer
16 than I anticipated. And it's a complicated question. One of
17 the things that I believe complicates it is the fact that there
18 is an appeal currently pending before the Ninth Circuit court
19 of appeals from the decision of the Ninth Circuit Bankruptcy
20 Appellate Panel. And I believe, but don't know, that it is
21 more likely than not that successful prosecution of the appeal
22 in the Ninth Circuit by the SunCal debtors in fact will moot
23 the motion which is before me.

24 There's a corollary, however, which is my granting the
25 pending motion may to some extent moot the appeal. This is

1 another example of what we've been colloquially calling gaming
2 the system, in effect, using litigation to gain tactical
3 advantages. In this instance, litigation which has gone all
4 the way to the Court of Appeals level in the Ninth Circuit and
5 litigation which was not brought here for stay relief that
6 could have been brought earlier.

7 Ultimately, the question of whether or not I should
8 grant relief from the automatic stay is driven by my
9 application of the Sonnax factors. And both parties appear to
10 be focused most heavily on the balance of harms factor. That's
11 convenient because I prefer to focus on that one myself.

12 One of the reasons I have a difficult time finding
13 that there is any material harm to the SunCal debtors in not
14 granting their motion for stay relief is that they did not
15 bring it until now. The SunCal debtors have scrupulously
16 avoided coming into this court from November of 2008 until
17 today. And have managed to deal with their litigation requests
18 in the bankruptcy court and beyond apparently without material
19 impairment in those efforts. In effect, they've elected their
20 remedy. They have chosen to proceed with litigation in their
21 home court. And when they suffered a reversal at the BAP level
22 at the end of last year then had to review their strategy
23 again.

24 Having gone to the Ninth Circuit, I believe the Ninth
25 circuit is the place for this question to be decided. And I'm

1 going to defer my decision with respect to stay relief until
2 after the Ninth Circuit has acted.

3 Moreover, and I think this is a very significant
4 point, the existence of the stay is not inconsistent with the
5 pursuit of negotiations that could lead to a resolution of this
6 ongoing dispute. The fact that the involuntary debtors,
7 through their trustee, appeared to have reached an agreement in
8 principle resolving many, if not all, of the same issues that
9 are set forth in the equitable subordination complaint,
10 demonstrates that it's possible for the parties to engage in
11 potentially productive discussions, notwithstanding the fact
12 that they stay remains in effect.

13 To the extent that the existence of the stay is viewed
14 as an impediment of any sort to meaningful dialogue, I want to
15 be absolutely clear in saying that I do not believe the stay
16 impacts in any adverse way the ability of the parties to meet
17 and confer -- to mediate or to otherwise seek a constructive
18 resolution of the matters that are currently before the
19 bankruptcy court in the Central District of California.

20 As to active litigation, the motion is denied without
21 prejudice to being reconsidered at some later time in the case,
22 either before or after the Ninth Circuit has acted.

23 And I will consider an appropriate order consistent
24 with what I've just said.

25 MR. PEREZ: Your Honor, we'll prepare one and submit

1 it to counsel.

2 THE COURT: Fine.

3 MR. O'KEEFE: Your Honor, can I ask a few clarifying
4 questions?

5 THE COURT: You can ask.

6 MR. O'KEEFE: Is the Court --

7 THE COURT: The motion's denied. I want to be really
8 clear on that. Your motion is denied.

9 MR. O'KEEFE: And I'm not rearguing the motion, Your
10 Honor.

11 THE COURT: Fine.

12 MR. O'KEEFE: So the Court -- is the Court finding the
13 stay applies and the motion is denied?

14 THE COURT: The stay applies and the motion is denied.

15 MR. O'KEEFE: Is the Court finding that insofar as
16 LBHI -- what is the Court's finding with respect to the
17 application of their stay?

18 THE COURT: I'm not making any particularized
19 findings. And let me be really clear, the law in the Southern
20 District of New York as stated by Judge Gonzalez in the Enron
21 case, and I choose to follow his reasoning, is that litigation
22 brought by a party against a debtor seeking to equitably
23 subordinate claims of that debtor constitutes a violation of
24 the automatic stay. To the extent that there are debtors or
25 debtor property implicated by your litigation I am saying the

1 stay applies. And I'm not going to say more than that. And I
2 think it's a good time for you to sit down.

3 MR. O'KEEFE: Very well, Your Honor. We appreciate
4 the Court's time and consideration.

5 THE COURT: Sure.

6 MR. MILLER: I just wanted to thank the Court for the
7 pro hac vice admission, and for hearing me this morning. Thank
8 you.

9 THE COURT: No problem at all. And then just so it's
10 clear what my view is of the Shinsei case because that has been
11 liberally misquoted in papers, my ruling with respect to the
12 Shinsei case speaks for itself. But I view actions taken
13 pursuant to principles of Japanese bankruptcy law which would
14 have the effect of subordinating claims, not to be covered by
15 the principal announced by Judge Gonzalez in the Enron case
16 because under Japanese law active litigation comparable to an
17 adversary proceeding is not involved. And in that case the
18 action taken by Shinsei Bank was not self executing and
19 involved actions to be taken by a quasi judicial figure, a
20 supervisor, who would be determining whether and when a
21 competing plan would be circulated to creditors. It was
22 incredibly fact specific, and is not subject to broad
23 application in the U.S.

24 MR. PEREZ: Thank you, Your Honor. May I be excused,
25 Your Honor?

1 THE COURT: Yes.

2 MR. PEREZ: I believe, Your Honor, the balance of the
3 matters on the docket are not being handled by our firm, Your
4 Honor.

5 (Pause)

6 MR. TAMBE: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. TAMBE: Jay Tambe from Jones Day, counsel for the
9 debtors.

10 I'm addressing items 4 and 5 on this morning's agenda.

11 Number 4 is the motion of the debtors for an entry of
12 order to consolidate certain proceedings. And the proceedings
13 we are seeking to consolidate are basically three. There are
14 two adversary complaints, one each against Nomura International
15 and Nomura Securities. And also we are seeking to consolidate
16 an objection with respect to Nomura GFP.

17 We've had some developments, I think we've resolved
18 part of the motion, and we're seeking to adjourn part of the
19 motion. I can address those issues if the Court would like.

20 THE COURT: I'd be delighted to hear about the
21 resolution.

22 MR. TAMBE: With respect to International and
23 Securities, those two entities did put in a response to the
24 motion to consolidate. And those two entities have expressed
25 concerns about consolidation off an evidentiary hearing or